

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

v.

OCEANSIDE UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015110982

ORDER GRANTING STUDENT'S
MOTION FOR STAY PUT

On November 19, 2015, Student filed a motion for stay put, asking that Oceanside transport him after school to his pediatric health care program, Together We Grow. On November 24, 2015, Oceanside Unified School District filed an opposition to the motion on the ground that it is not required to transport Student to the facility because the program is now located outside of Oceanside's attendance boundaries, and that program is not required in order for him to be provided with a free appropriate education.¹

APPLICABLE LAW

Until due process hearing procedures are complete, a special education student is entitled to remain in his or her current educational placement, unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a) (2006)²; Ed. Code, § 56505 subd. (d).) This is referred to as "stay put." For purposes of stay put, the current educational placement is typically the placement called for in the student's individualized education program that was implemented prior to the dispute arising. (*Thomas v. Cincinnati Bd. of Educ.* (6th Cir. 1990) 918 F.2d 618, 625.)

In California, "specific educational placement" is defined as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to

¹ Oceanside also claims that Student, who is over the age of 18, has provided no proof that he is conserved, or otherwise has conveyed his educational rights to Parents, who have retained an attorney. However, although the attorney in pleadings refers to Parents as "petitioners on behalf of [Student]," because Student is over 18, he is the attorney's client, unless there is proof that he is either conserved, or has transferred his educational rights to Parents.

² All references to the Code of Federal Regulations are to the 2006 edition.

an individual with exceptional needs,” as specified in the IEP. (Cal. Code Regs. tit. 5, § 3042, subd. (a).)

Courts have recognized, however, that because of changing circumstances, the status quo cannot always be replicated exactly for purposes of stay put. (*Ms. S. ex rel. G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1133-35, superseded by statute on other grounds (*Vashon Island*), 20 U.S.C. § 1414(d)(1)(B).) For example, it does not violate stay put if a school is closed for budget reasons and the child is provided a comparable program in another location. (See *McKenzie v. Smith* (D.C. Cir. 1985) 771 F.2d 1527, 1533; *Knight v. District of Columbia* (D.C. Cir. 1989) 877 F.2d 1025, 1028; *Weil v. Board of Elementary & Secondary Education* (5th Cir. 1991) 931 F.2d 1069, 1072-1073; see also *Concerned Parents & Citizens for Continuing Education at Malcolm X (PS 79) v. New York City Board of Education* (2d Cir. 1980) 629 F.2d 751, 754, cert. den. (1981) 449 U.S. 1078 [101 S.Ct. 858, 66 L.Ed.2d 801]; *Tilton v. Jefferson County Bd. of Education* (6th Cir. 1983) 705 F.2d 800, 805, cert. den. (1984) 465 U.S. 1006 [104 S.Ct. 998, 79 L.Ed.2d 231].

DISCUSSION

Student claims in his due process complaint, and in his motion for stay put, that during the 2014-2015 school year, Oceanside transported him after school from his adult transition program at Ditmar Adult School, to his after-school care facility, Together We Grow. This is a pediatric day health care program. Student’s participation in this program is funded by the Regional Center and Medi-Cal. This is not a regular after school day care program, such as one offered privately for neurotypical students. During the 2014-2015 school year the Together We Grow’s facility attended by Student was located within Oceanside’s boundaries. Student now asks that Oceanside continue to provide transportation from his adult transition program at Ditmar to Together We Grow after school, during the pendency of this proceeding. Student claims that Oceanside is now refusing to transport him after school from Ditmar to the location Together We Grow is now located, because that location is outside of Oceanside’s attendance boundaries. Student asks that OAH order transportation from Ditmar to the new location of Together We Grow because transportation to the facility is stay put.

In its opposition, Oceanside does not dispute Student’s claim that it transported him from his adult transition program to Together We Grow for the 2014-2015 school year. However, Oceanside claims that it provided this transportation as a “courtesy.” During the summer of 2015, Together We Grow moved from its previous location within Oceanside boundaries, to a location outside Oceanside’s boundaries; therefore, Oceanside argues, it is no longer required to provide this after school transportation to Together We Grow. Oceanside does not dispute Student’s allegation that the current site of Together We Grow is just 5.6 miles outside of Oceanside’s boundaries.

Attached to the opposition is a supporting declaration by an Oceanside administrator. Attached to the declaration are copies of the IEP’s for the 2014-2015 and the 2015-2016

school years. In both IEP's there are pages which contain Oceanside's offer of services to Student, including transportation. The description of transportation is identical in both IEP's, "bus (curb to curb)." Nowhere in either IEP is an indication of the location where each "curb" is physically located.

For both school years, Parents completed a separate document required by Oceanside for it to provide him with transportation entitled "Oceanside Unified School District--Transportation Request." This request form is not part of the IEP. In both request forms are two lines, the first for "Pick-up point", and the other for "Drop off point." Each line contains two boxes, one of which is to be checked. The first box contains the notation, "Same as home." The second box is followed by a line which must be completed with an address of the location for pick-up or drop off if the location is not the student's home. The fact that Oceanside's transportation request forms contain a space for families to indicate pick up and drop off locations other than a student's home is indicative that transportation for a student is not premised on the fact that a student will only be transported between his home and school of attendance.

For the 2014-2015 school year Parents wrote in "Together We Grow" on both lines, indicating that this was where Student was to be picked up and dropped off each day by Oceanside transportation. On September 4, 2015, Father completed the transportation request form for the 2015-2016 school year. On this form Father gave a pick up address that is not the same as Student's home address on the IEP, and Father left the drop off portion of the form blank. In a declaration attached to the stay put motion, Father states that he did not complete the drop off portion of the request because an IEP meeting was to occur later in September 2015 to discuss transportation. At some point after Father turned in the form to Oceanside, someone wrote "Home" on the drop off line. Father states in his declaration that he did not make this notation in the drop off line, and this is undisputed by Oceanside.

At an IEP team meeting on September 14, 2015, the transportation issue was discussed as a possible addendum to Student's 2014 annual IEP. Student was represented by an advocate. Parents asked that Oceanside provide transportation for Student after school to Together We Grow's new location. Oceanside personnel informed Parents at this meeting that it would not provide transportation to Student to Together We Grow because the facility was now located outside its attendance boundaries. At this meeting Oceanside conceded that if a student with an IEP attended an after-school extracurricular activity that was required to provide him with a FAPE, but the activity venue was located outside its attendance boundaries, it would be required to provide the student with transportation.

Student's annual IEP team meeting was held on September 21, 2015. There is no evidence that transportation was discussed at this meeting. Parents signed consent to the IEP, and, as previously noted, the IEP only states that transportation is "bus (curb to curb)." If Oceanside wished to expand the transportation description in the September 21, 2015 IEP, to include a statement that transportation was only to/from Student's home and Ditmar, or was only to a location within its attendance boundaries, it could have done so. It did not, even though it was aware that Student was requesting after-school transportation for the

2015-2016 school year to Together We Grow's new location outside its attendance boundaries, based on the discussion at the IEP team meeting on September 14, 2015.

Oceanside's arguments in its opposition to the motion for stay put are not persuasive. In its opposition, it cites an order from one OAH case denying Student's motion for stay put, and the decision in another OAH case. However, an ALJ is not bound by either the order or the decision, even if they could not be distinguished from the case at hand, which they can be. (5 C.C.R. § 3085.) Oceanside also places great weight on *Fick v. Sioux Falls School District* (8th Cir. 2003) 337 F.3d 968 in which the court overturned a decision that a school district transport a student to a daycare provider outside the district's boundaries. However, because this is not a Ninth Circuit case, it is not precedential. Further, this case is distinguishable from the instant matter in that although the student was being transported to a regular day care provider outside of the transportation area in which the child's school was located, there was no evidence that this day care was necessary to provide the student a FAPE. Although Oceanside argues in its opposition that Together We Grow does not provide Student with educational benefit, Student argues otherwise in his motion for stay put and complaint claiming it provides him with educational benefits by way of a social program and other extracurricular activities. However, this is a factual issue that must be determined by the ALJ conducting the due process hearing in this matter in determining whether Oceanside must provide transportation to Together We Grow in the future, even though the facility is now located outside Oceanside's attendance boundaries.

The language in both IEP's regarding transportation is identical, "bus (curb to curb)," and during the 2014-2015 school year that meant Student was transported to Together We Grow and this was not questioned by Oceanside during that school year. District did not change this language in the new annual IEP dated September 21, 2015, and does not argue that the distance between Ditmar and Together We Grow's new location is so great that it would be impracticable or impossible for it to provide this after-school transportation. Accordingly, transportation at the end of the school day of Student to Together We Grow's new location is stay put for Student.

ORDER

Oceanside shall transport Student after school each day to Together We Grow's facility in Vista, California pending the conclusion of these proceedings.

DATE: December 2, 2015

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings